had knowledge of it and actively participated in it. He said, at p. 362:

"In the second place, even if it were a term, the defendant would have to show that the English company were implicated in this illegality, that is, that they had knowledge of it and were actively participating in it: see *Foster* v. *Driscoll* [1929] 1 K.B. 470, 518, by Sankey L.J."

The passage of the judgment of Sankey L.J. in *Foster* v. *Driscoll*[2] referred to by Lord Denning, is as follows:

"... In my view the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, the Court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract."

In the circumstances, having examined the allegations made by Mohamed Yusoof s/o Mohamed Dawood in his affidavits, there was really little or no substance in the suggested defence. The allegations by him of the "joint illegal enterprise" and of the plaintiffs being "privy to this joint illegal enterprise" were merely bald statements without any facts or evidence to support them. This is almost one of those cases where summary judgment should be ordered. However, in order not to shut the defendants out from such defence, I gave to the defendants conditional leave to defend.

As regards the condition I imposed, I do not think it is unfair or unreasonable to the defendants. They are still carrying on a diamond business and they or their directors should be able to arrange for a bank guarantee. There was no evidence that they could not do so. They had taken the diamonds and gems from the plaintiffs and had sold them, and had the benefit of such sales.

Order accordingly.

Solicitors: *Richard Ang & Co.; Kala Mohan & Peter.*

A BRUNEI REPORT

PUBLIC PROSECUTOR v. FRANCIS DANG ANAK NUYA

[O.Cr.J. (Macdougall J.) May 20, 1987]

[Bandar Seri Begawan – Criminal Trial No. 6 of 1987]

Criminal Procedure – Murder – Plea to lesser offence of culpable homicide not amounting to murder – Whether murder charge needs to be amended – Sentence – Whether s.304 of Penal Code (Cap. 22) imposes a mandatory sentence of life imprisonment – Criminal Procedure Code, ss. 158 & 170.

Criminal Law – Penal Code (Cap. 22), s. 304 – Whether section imposes a mandatory sentence of life imprisonment.

In this case, the accused who was originally charged with murder subsequently decided to plead guilty to the lesser offence of culpable homicide not amounting to murder. The two issues before the court were: (1) whether the prosecution needs to amend the murder charge to one involving the lesser offence; (2) whether the first limb of section 304 of the Penal Code (Cap. 22) imposes a mandatory sentence of life imprisonment.

Held: (1) in a case such as the present one the correct procedure is for the charge of murder to be read to the accused for plea. If he wishes to plead guilty to the lesser offence, it is open to him to plead not guilty to murder but guilty to culpable homicide not amounting to murder. The agreed facts should then be read to the accused. If he confirms that they are correct, it is then open to the prosecution to state whether it accepts that plea;

(2) if the practice has been to substitute a charge of culpable homicide not amounting to murder for one of murder where the prosecution is prepared to accept a plea from the accused to the lesser offence, then it is wrong and should cease;

(3) section 304 imposes a mandatory sentence of life imprisonment.

Case referred to:

(1) *Public Prosecutor* v. *Lee Ah Sam* [1949] M.L.J. 236.

CRIMINAL TRIAL.

Ivan Leong (Deputy Public Prosecutor) for the Public Prosecutor.

Daljit S. Sandhu for the accused.

Cur. Adv. Vult.

Macdougall J.: At the beginning of this trial, the Deputy Public Prosecutor, Mr. Ivan Leong, having indicated that the accused intended to plead guilty to the lesser offence of culpable homicide not amounting to murder, sought my guidance as

to whether the prosecution should file an amended charge.

According to Mr. Leong, where the charge is one of murder and the accused has offered to plead guilty to the lesser offence, it has hitherto been the practice for the prosecution, if it is prepared to accept such a plea, to file an amended charge so as to substitute the charge of murder with one of culpable homicide not amounting to murder punishable under section 304 of the Penal Code (Cap. 22).

The authority that Mr. Leong relied upon in justification of this procedure is section 158 of the Criminal Procedure Code (Cap. 7) which reads as follows:

"(1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials with the aid of assessors, before the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused."

This section does not confer on the prosecution a right to alter or add to a charge without the leave of the Court. It is plain that the power to alter or amend resides in the Court, not the prosecution, and that if the prosecution seeks to alter or amend or charge, it must make application to the Court for leave to do so.

In my view, however, in a case such as the present one, the correct procedure is for the charge of murder to be read to the accused for plea. If he wishes to plead guilty to the lesser offence, it is open to him to plead not guilty to murder but guilty to culpable homicide not amounting to murder. The agreed facts should then be read to the accused. If he confirms that they are correct, it is then open to the prosecution to state whether it accepts that plea.

The greater offence of murder necessarily includes the lesser offence of culpable homicide not amounting to murder. Indeed, in a contested murder trial, it is possible that the accused may not be found guilty of murder but of the lesser offence.

Section 170 of the Criminal Procedure Code provides:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

(3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in subsection (1) of section 132 of this Code when no complaint has been made as required by that subsection."

If the practice has been to substitute a charge of culpable homicide not amounting to murder for one of murder where the prosecution is prepared to accept a plea from the accused to the lesser offence, then it is wrong and should cease. The correct procedure is that which I have already outlined.

The accused having pleaded guilty to the lesser offence of culpable homicide not amounting to murder and having confirmed the facts as read out by the prosecutor, which included the fact that he had intended to kill the deceased, the prosecution and the Court accepted his plea.

It is not disputed that the punishment for which the accused thus becomes liable is that referred to in the first limb of section 304 of the Penal Code. The section reads:

"Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to 10 years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

Mr. Sandhu submitted on behalf of the accused that the words "shall be punished with imprisonment for life" are not mandatory but that the Court has a discretion to impose such sentence of imprisonment that it thinks fit up to a maximum of life imprisonment.

In support of his contention he relied on two principal arguments. First, he referred to the corresponding section of the Indian Penal Code, which is also section 304. It reads as follows:

"Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention

of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause such bodily injury as is likely to cause death."

Mr. Sandhu sought to persuade me that since there have been numerous instances of sentences less than life imprisonment having been imposed under the first limb of that section, it follows that it is not mandatory to pass a sentence of life imprisonment as punishment for an offence under the first limb of section 304 of the Penal Code of Brunei.

There is, however, a vital distinction between the two sections. Whilst it is mandatory under the first limb of each section to impose a sentence of imprisonment, the Indian section invests the Court with a discretion to pass either a life sentence or one not exceeding ten years. The Brunei section does not confer this discretion on the Court. The only sentence expressed to be applicable to an offence under the first limb is one of life imprisonment.

Moreover, the words "shall be punished with" are used, not the words "may be punished with" or the words "shall be liable to." The mandatory force of the words "shall be punished with" is reinforced by the use in the second limb of the section of the words "which may extend to 10 years." These latter words clearly confer a discretion on the Court to impose such sentence not exceeding ten years as it thinks fit. If therefore the legislature had intended that in cases falling within the first limb of the section the length of imprisonment should be left to the discretion of the Court, it would undoubtedly have used similar words to those found in the second limb, and not the mandatory words "shall be punished with."

Accordingly I do not think that there is any substance in the first argument advanced by Mr. Sandhu.

His second argument was that if the words "shall be punished with" in the first limb of section 304 are mandatory, their plain effect is overridden by section 39 of the Interpretation and General Clauses Act (Cap. 4). The section reads:

"Whenever, in or by virtue of any written law, a penalty, whether of imprisonment or fine, is prescribed for an offence the same shall imply –

(a) that such offence shall be punishable upon conviction by a penalty not exceeding the penalty prescribed; and

(b) if the amount of the fine is unspecified, that such offence shall, without prejudice to any provision of law against excessive and unreasonable fines and assessments, be punishable by a fine of any amount."

In further support of this argument, Mr. Sandhu cited the case of *Public Prosecutor* v. *Lee Ah Sam*[1]. This concerned an offence against Regulation 5(1) of the Emergency Regulations 1948 of which the relevant part then read:

"shall be liable to be punished with death, or with penal servitude for life and whipping."

Section 51 of the Interpretation and General Clauses Ordinance 1948 (Malayan Union Ordinance No. 7 of 1948), which the Court found to be applicable to the Regulations, was as follows:

"Whenever in any written law a penalty is provided for an offence against such law, such provision shall indicate that such offence shall be punishable, upon conviction, by a penalty not exceeding (except as may be otherwise expressly mentioned in such law) the penalty provided."

The Court held that, by virtue of this section, where by any provision of law a penalty is prescribed, unless there is some express provision in that law itself stating otherwise, the penalty prescribed is the maximum.

It is clear that the wording of the regulation is materially different from that of section 304 of the Penal Code. The words "shall be liable to," which appear in the regulation, do not appear in section 304 of the Penal Code. They lack the mandatory force of the words "shall be punished with."

Section 39 of the Interpretation and General Clauses Act and section 51 of the corresponding Malaysian legislation were enacted, as were similar sections in other parts of the Commonwealth, to remove any doubt that might otherwise exist that unless mandatory words are used in a penal provision the offence to which it relates is punishable by a penalty not exceeding the penalty prescribed.

Mr. Sandhu then pointed out that words similar to "except as may be otherwise expressly mentioned in such law," as appear in section 51 of the Malaysian legislation, do not appear in section 39 of the Brunei Act. This, however, overlooks the existence of section 2(1) of that Act which provides:

"Save where the contrary intention appears, the provisions of this Act shall apply to this Act and to any written law now or hereafter in force made by competent authority in Brunei, and to any instrument made or issued thereunder."

In my view, a contrary intention plainly appears from the wording of section 304 of the Penal Code. Section 39 is designed to apply to penalty provisions where no indication is given that the legislature intended that there be a specific mandatory penalty.

An example of such a provision is section 292 of the Penal Code which concludes with these words:

"Penalty, a fine of not less than $500 and not more than $5,000 and/or imprisonment for 12 months, and in the case of a second or subsequent conviction, a fine of not less than $1,000 and not more than $30,000 and/or imprisonment for 3 years."

Section 39 thus makes it clear that the two terms of imprisonment where referred to may not exceed 12 months in the first case and three years in the second.

Another example is section 16 of the Societies Act (Cap. 66) which provides for a penalty of imprisonment for three years. These are but two of many examples that could be cited of sections which do not stipulate that the penalties stated therein are mandatory. In each case, section 39 makes it plain that these penalties are but the maximum terms of imprisonment that a Court may impose for the offences to which they relate.

It is to sections such as the examples I have given that section 39 applies. Where, however, as in the case of section 304 of the Penal Code, a contrary intention appears, section 39 has no application.

Accordingly I am of the view that the second argument advanced by Mr. Sandhu must also fail and that I am obliged by section 304 to sentence the accused to life imprisonment.

Order accordingly.

Solicitors: *Sandhu & Co.*

MALAYSIAN REPORTS

WONG CHEE HONG v. CATHAY ORGANISATION (M) SDN. BHD.

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C.JJ.) January 9 & May 25, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 194 of 1986]

Labour Law – Dismissal of employee – Dismissal without just cause or excuse – Constructive dismissal – Right of employee to terminate contract of service – Demotion of employee through transfer – Industrial Relations Act 1967, s.20.

Administrative Law – Certiorari – Application to quash decision of Industrial Court – Demotion of employee without just cause or excuse – Constructive dismissal – Industrial Relations Act 1967, s.20.

The appellant had risen in the service of the respondent company to the post of Personnel and Industrial Relations Manager and had in that capacity successfully negotiated a new collective agreement with the trade union. The trouble started after he had taken steps to implement the award confirming the collective agreement. The appellant was told that he would be transferred to manage a cinema theatre belonging to the respondent. The appellant did not accept the transfer order as he regarded it as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The dispute was referred to the Industrial Court which gave an award in favour of the appellant holding that the appellant was constructively dismissed and awarded him compensation. The respondent company applied for *certiorari* to quash the award and this was granted in the High Court. The learned judge stated that constructive dismissal is not within the ambit of section 20(1) of the Industrial Relations Act and therefore the Industrial Court had no jurisdiction. The appellant appealed.

Held, allowing the appeal: (1) when the Industrial Court is dealing with a reference under section 20 of the Industrial Relations Act, the first thing that the court will have to do is to ask itself a question whether there was a dismissal and if so whether it was with or without just cause or excuse;

(2) the common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer;

(3) there can be no doubt that the appellant in this case was lawfully doing his duty as the Personnel and Industrial Relations Manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award and implemented it. The reward for lawfully performing his duties was, however, not promotion but a demotion;

(4) what took place in this case was not a transfer but a demotion meted out without any disciplinary action taken.